**Comments of the**

**National Consumer Law Center®**
**(On behalf of its Low-Income Clients)**

**And**

**Center for Responsible Lending**
**Consumer Action**
**Consumer Federation of America**
**Consumers Union**
**Empire Justice Center**
**New York Legal Assistance Group**
**Sargent Shriver National Center on Poverty Law**

Regarding

Notice of Proposed Rulemaking
Amendments to Regulation Z Provisions Implementing
the Credit Card Accountability, Responsibility and Disclosures Act of 2009

Federal Reserve System
12 CFR Part 226

Docket No. R-1393
RIN No. 7100-AD55

January 3, 2011

These comments are submitted by the National Consumer Law Center (on behalf of its low-income clients), as well as the Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumers Union, Empire Justice Center, New York Legal Assistance Group, and the Sergent Shriver Center on Poverty Law.[1]

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[1] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws, including Truth In Lending and Cost of Credit. These comments were written by Chi Chi Wu and Lauren Saunders of NCLC. The **Center for Responsible Lending** is a non-profit organization focused on policy research and advocacy to stop predatory lending practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development lenders, whose mission is to create and protect ownership opportunities for low-wealth families through home and small business ownership. Self-Help has provided $3.8 billion in financing to help over 30,000 low-wealth borrowers buy homes, build businesses and strengthen community resources. Additionally, our affiliate Self-Help Credit Union maintains deposit accounts for individuals, nonprofit and religious organizations, and foundations. **Consumer Action**, founded in 1971, is a San Francisco based nonprofit education and advocacy organization with offices in

These comments address the Federal Reserve Board's November 2, 2010 Notice of Proposed Rulemaking, which proposes amendments to certain Regulation Z provisions implementing the Credit Card Accountability, Responsibility and Disclosures Act of 2009 (Credit CARD Act). 75 Fed Reg. 67,458 (November 2, 2010).

## I. Overview

We appreciate the Board and staff's efforts in issuing the proposed amendments, and support a number of them that close loopholes and address evasions of the Credit CARD Act's protections. In particular, we support the proposals:

- To require that a card issuer consider the consumer's *independent* ability to pay.
- To limit fees, including fees charged before the account is opened, to 25% of the credit limit.
- To prohibit issuers from using rebates or waivers to circumvent the protections against retroactive rate increases.

Our primary concerns are:

- The narrower definitions of "credit card" and "credit card account under an open-end (not home-secured) consumer credit plan" could lead to evasions and exclude

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Los Angeles and Washington, DC. For more than two decades, Consumer Action has conducted a survey of credit card rates and charges to track trends in the industry and assist consumers in comparing cards. The **Consumer Federation of America** is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million. CFA was founded in 1968 to advance consumers' interests through advocacy and education. **Consumers Union** is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support. The **Empire Justice Center** is a statewide public interest law firm with offices in Albany, Rochester, White Plains and on Long island, New York. With a focus on poverty law, Empire Justice Center undertakes research and training, engages in legislative and administrative advocacy and provides legal assistance to protect the rights of disenfranchised New Yorkers. Founded in 1990 on the premise that low-income individuals and their families can improve their lives significantly if given access to the justice system, **New York Legal Assistance Group** works to empower individuals, protect fundamental legal rights, and promote access to justice among vulnerable New Yorkers. NYLAG serves immigrants, seniors, the homebound, families facing foreclosure, renters facing eviction, low-income consumers, those in need of government assistance, children in need of special education, domestic violence victims, persons with disabilities, patients with chronic illness or disease, low-wage workers, low-income members of the LGBT community, Holocaust survivors, and others in need of free legal services. **The Sargent Shriver National Center on Poverty Law** is a national law and policy center that provides national leadership in identifying, developing and supporting innovative and collaborative approaches to achieve social and economic justice for low-income people. The Shriver Center's Community Investment Unit (CIU) works on creating opportunities for low-income and minority populations to build assets. Assets are the building blocks of long-term financial stability and success for people at all income levels.

some accounts that should be covered from the Truth in Lending Act's credit card protections.

- We support most of the proposed changes to grace period disclosures, but we urge the Board to go further in standardizing those disclosures and preventing unfair and deceptive grace period practices, including one described in a proposed comment.

We also have a number of comments and suggestions on other aspects of the proposed amendments.

## II. Significant Issues and Changes

### A. 226.2(a)(15): Definition of "credit card" and "credit card account under an open-end (not home-secured) consumer credit plan"

#### *1. Overview of Concerns*

In the rules finalized February 22, 2010, the Board created a definition of "credit card account under an open-end (not home-secured) consumer credit plan" (hereinafter, "CARD Act credit card") separate from the primary definition of "credit card." The definition of CARD Act credit cards excluded home equity lines of credit and overdraft lines of credit accessed by a debit card. The Credit CARD Act provisions were limited to the narrower CARD Act credit cards, whereas the preexisting credit card provisions of TILA continued to apply to all accounts that fall under the broader definition of "credit card."

The Board now proposes to exclude another type of open-end account from the definition – lines of credit accessed by an account number. The intent appears to be to exclude these accounts from certain Credit CARD Act protections, such as the disclosures for minimum payment repayment cost.

However, the Board's proposal goes further than the intent, and narrows the types of accounts that are considered credit cards, both under the primary credit card definition as well as under the CARD Act credit card definition. It does so primarily by adding to the Commentary illustrations for the broader, primary definition of "credit card." It adds an example explaining that account numbers that are used to access a line of credit tied to a deposit account are considered credit cards only if they are used directly to purchase goods or services and not if they are used to transfer funds into the deposit account. In addition, if the line of credit can be accessed by a card, such as when cash is withdrawn from the credit line at an ATM, then the card is a credit card.

We are concerned that the further narrowing of credit card protections could have three problematic impacts:

(1) Accounts would lose longstanding TILA provisions that currently apply to all credit cards as defined under the existing definition, in particular the protection against offsets.

(2) Important Credit CARD Act protections would not apply to some open-end credit accounts that are accessed directly or indirectly by cards or account numbers. In particular, they would not apply to predatory account advance products that are spreading in the marketplace and have already provoked regulatory action for unfair and deceptive practices.

(3) The further exclusions could lead to ambiguities and evasions, especially in the prepaid market where issuers already have an incentive to steer customers due to new interchange rules.

### 2. *Background on New, High-Cost Open-End Lines of Credit*

It is important to note that there is a wide variety of credit lines that will fall into the categories excluded under the proposed Commentary. On the affordable and traditional end, many credit unions and some banks offer overdraft lines of credit at 18% APR or lower, as we described in a recent report.[2] As the Board pointed out in its February 22, 2010 final rule to justify excluding these lines of credit from the definition of CARD Act credit card, these credit lines do not generally present consumer protection problems, are not typically used for long term extensions of credit, and are not used by most consumers.[3]

At the other end of the spectrum, some large banks and a growing number of smaller ones are essentially making predatory payday loans through their account advance products.[4] Tied to either a deposit or prepaid account, these products are priced like payday loans, in the range of $2 per $20 borrowed, with a very short, balloon payment repayment period: the very next payday, which could be only a few days later. These products are promoted as very short term loans. However, like other payday loans, their unaffordable structure leads to repeat rollovers and much longer term and more expensive credit than originally envisioned.[5]

These products are spreading as banks, prodded by consultants, look for alternatives to overdraft income in the wake of the Regulation E changes.[6] Bank

[2] *See* NCLC, Stopping the Payday Loan Trap: Alternatives that Work, Ones that Don't at 19-23, 30-34, available at http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf.
[3] *See* 75 Fed. Reg. 7658, 7664 (Feb. 22, 2010).
[4] *See* Stopping the Payday Loan Trap at 24-26, 37-38 (describing products by U.S. Bank, Wells Fargo, Fifth Third Bank, GuarantyBank, MetaBank, and Urban Trust Bank).
[5] See Stopping the Payday Loan Trap at 4-6; Center for Responsible Lending, Springing the Debt Trap (Dec. 13, 2007), available at http://www.responsiblelending.org/payday-lending/research-analysis/springing-the-debt-trap.html.
[6] *See* Matt Blumenfeld, "Fiserv Offers Overdraft Alternative To Help CUs Recapture Members," Credit Union Journal (January 11, 2010) (describing $10 per $100 loan program to replace overdraft revenue).

consultants and vendors are promoting the products, and we fear that these account advance programs are on the verge of explosive growth and will become the newest bank abuse.

These account advance lines of credit have predatory features and are marketed to vulnerable consumers who especially need vigilant protection:

- The cost and structure of these credit products makes them inherently unaffordable and subject to rollovers and exploding debt.[7]
- The Office of Thrift Supervision recently shut down one such account advance program, iAdvance offered by MetaBank, finding that the bank was engaged in unfair or deceptive practices.[8]
- Account advance products tied to prepaid cards have been used in some instances to avoid state payday laws through preemption.[9]
- Bank payday loans also do not come with a "Schumer box," nor conspicuous or realistic APR disclosures that consumers can use to compare different forms of credit.[10]

These bank payday loans have the essential hallmarks of a credit card[11] under an open-end (not home-secured) plan: they extend credit; are open-end, reusable plans[12]; and enable purchases of goods or services through use of a card or account number (though one that is tied to the deposit account and is one step removed). Notably, all of these credit products, to our knowledge, fund accounts accessible through a Visa or MasterCard debit or prepaid card. The fact that the structure is newer and does not fit into the model of a traditional credit card does not mean that consumer protections should not apply. Indeed, as discussed below, the Board has long recognized that a credit account that is tied to a deposit account can still be viewed as a credit card entitled to appropriate protections.

As the Board has noted, "Congress intended the Credit Card Act to apply broadly to products that meet the definition of a credit card."[13] The Board also noted that there is

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[7] *See* Stopping the Payday Loan Trap at 4, 8, 13-18.
[8] *See* Meta Financial Group, Inc., SEC Form 8-K, Comm'n File No. 0-22140 (Oct. 6, 2010), available at http://bit.ly/arD8BP.
[9] The Insight Prepaid MasterCard offered by Atlanta-based Urban Trust Bank became available at Arizona payday stores just as the Arizona law permitting payday loans sunsetted. *See* Stopping the Payday Loan Trap at 25-26.
[10] Some of the banks disclose a 120% APR, but that is typically buried in the fine print, often difficult to find, and assumes an unrealistic 30 day loan period.
[11] Because these cards typically do not use a periodic rate to compute a finance charge, they may actually be charge cards rather than credit cards. But for purposes of simplicity, we are not distinguishing between charge cards and credit cards in these comments.
[12] The single, balloon payment structure raises the question whether these are in fact open-end loans.
[13] 75 Fed. Reg. at 7664.

a special imperative to cover products under the Credit CARD Act when there is not an alternative form of regulation, and "[n]o such alternative exists for lines of credit accessed solely by account numbers," such as bank payday loans. Even when a card is used to withdraw cash from the credit lines at an ATM, we understand that it is done indirectly, by first transferring the cash into the asset account, and thus would be outside the Board's regulations.

Accordingly, we recommend against adopting the broad exclusions in the proposed Commentary. Instead, the Board should consider tailored exemptions, modifications or safe harbors from particular provisions as needed for accounts that operate differently from traditional credit cards and do not pose consumer protection problems.

### *3. The Board Should Not Amend Regulation Z's Pre-CARD Act Protections*

The proposed illustration does not merely narrow the definition of CARD Act credit cards; it applies to the primary definition of "credit card." Thus, it impacts older credit card provision and not merely those stemming from the Credit CARD Act.

The Commentary currently recognizes that a "credit card" includes a "card that accesses both a credit and an asset account (that is, a debit-credit card)." Comment 226.2(a)(15)-2.i.B.. Conversely, the Commentary excludes debit cards from the definition of credit card only if there is "no credit feature or agreement" beyond the occasional honoring of an inadvertent overdraft. 226.2(a)(15)-2.ii.A. The Board does not propose to change these provisions.

If the new exclusion applies to all credit card provisions, then there could be confusion about application of the unchanged Commentary provision explaining that "if the consumer writes a check that accesses an overdraft line of credit, the resulting indebtedness is subject to the offset prohibition since it is incurred through a credit card plan, even though the consumer did not use an associated check guarantee or debit card." Comment 226.12(d)(1)-3.

The important protection against offset should apply whether the card or other access device creates the indebtedness by pulling through a deposit account to an overdraft line of credit or by first putting the funds into the deposit account and then accessing them. The timing does not change the importance of protecting the consumer's asset account from offset.

We are not aware of any difficulties that would be posed by continuing the Board's longstanding tradition of subjecting all lines of credit that can be accessed through an access device to the TILA credit card provisions that pre-date the Credit CARD Act. Any confusion appears to be limited to the newer Credit CARD Act provisions (discussed below).

Our primary recommendation is to eliminate the exclusions in the proposed illustration. If the Board rejects that recommendation, it should make the new illustrations applicable only to CARD Act credit cards, not all credit cards. Thus, the new illustration should become new Comment 2(a)(15)**(ii)-1** and should state:

> 1. A credit card account under an open-end (not home-secured) consumer Credit Plan does not include:
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> [text of proposed Comment]

### *4. Open-end Lines of Credit Should be Subject to Certain Important Credit CARD Act Protections*

The line between lines of credit and credit cards is a blurry one, and an artificial line should not be used to deprive consumers of necessary protections. As discussed above, Regulation Z and the Commentary have long considered lines of credit that can be triggered through access devices to be credit cards. The exclusions that the Board drew last year and now proposes – overdraft credit and credit that first is put into a deposit account before being spent rather than vice versa – are not ones that appear in the Credit CARD Act.

Consumers who use a debit or prepaid card to access an account tied to a line of credit need and deserve the same protections that traditional credit card accounts have should abuses emerge in other markets. Many of the substantive protections of the Credit CARD Act would not impact lines of credit even if they applied, because the lines of credit currently on the market are not generally engaged in the same abuses (such as payment allocation or double cycle billing abuse) that provoked these protections. To the extent that the protections are relevant, however, all accounts should comply with them.

In particular, lines of credit that can be accessed directly or indirectly by an access device should comply with the following provisions:

- Ability to pay. All credit should be based on ability to pay, and all lenders should consider whether the borrower is likely to be able to repay the loan under its terms without resorting to the ability to seize collateral. Improvident lending and lending based on the ability to seize collateral have long been considered predatory practices that would be unfair under the Federal Trade Comission Act even if the more specific provisions of the Credit CARD Act do not apply. Depending on the repayment terms, a small ($300) line of credit may not need the same full application that is required for a credit card. But larger credit lines, or small ones with unaffordable (i.e., balloon payment) repayment structures deserve more rigorous underwriting. These credit lines can be used to purchase goods and services through a card or other access device and deserve attention whether the purchase is a one- or two-step process.

- Changes in terms in the first year. Bait and switch is unfair and deceptive in any context.

- Penalty fees that are not reasonable or proportional. Exorbitant penalty fees are unfair in any account, and especially should not be tolerated in accounts tied to a card or other access device. Large, profitable penalty fees also give creditors an incentive to engage in unfair or deceptive practices to induce consumers to trigger those fees. Institutions that offer lines of credit should have no trouble complying with the safe harbors for penalty fees in Regulation Z, and the Board should closely scrutinize any that do not.

- Marketing to students. No issuer should be able to bribe or induce students to open credit accounts by offering a tangible item as inducement. This applies equally to deposit accounts that have a credit feature and to traditional credit cards.

Other Credit CARD Act provisions are aimed at practices that, to our knowledge, do not occur in lines of credit today. For that reason, it should pose no problem to extend these protections to deposit-credit accounts in order to ensure that the abuses do not spread:

- 25% limit on fees[14] and security deposits.
- Retroactive rate increases.
- Payment allocation rules.
- Reevaluation of rate increases.
- Right to reject changes.
- Ban on double-cycle billing.
- Opt in for over limit fees.

As with the older TILA credit card provisions, the question is whether there are serious unintended consequences from applying the Credit CARD Act provisions to lines of credit and other accounts tied to deposit accounts that can be accessed through an access device. Even if the answer is yes, there may be more tailored ways of addressing those consequences without leaving consumers unprotected.

We believe the better approach would be to adopt more narrowly tailored exclusions from particular provisions rather than excluding these accounts from all Credit CARD Act provisions. The Board has already taken a tailored approach to lines of credit, subjecting them to some of the credit card provisions of TILA but not all[15] and could do the same with respect to the Credit CARD Act. For example, there may be no need for a

[14] The bank payday loans typically have fees that are less than 25% of the initial loan. However, if the loans are rolled over several times, the resulting fees could be far higher for essentially the same amount of credit. The Board or Consumer Financial Protection Bureau should investigate the typical pattern of bank payday lending and determine whether they are a form of fee harvester card that should be subject to protection.
[15] *See* 75 Fed. Reg. at 7664.

minimum payment repayment disclosure on an account that has a repayment structure of three years or less.

Similarly, the Board can consider simplified ability to pay requirements through safe harbors for presumptively safe credit accounts (i.e., those with small credit lines, moderate rates and fees, and affordable installment payment structures). But there is no reason why larger credit lines, or those with more dangerous payment structures, should escape ability to pay requirements. Card accounts that are funded by credit accounts function in a very similar fashion to traditional credit cards and present the same ability to pay concerns.

For bank payday loans, unlike for HELOCs, there are not "alternative forms of regulation that are better suited to protection consumers from harm with respect to those product exists," and consumers are likely to experience substantial harm if these loans are left unregulated.[16] This is a special concern as the market for bank payday loans is relatively new and growing.

Many of the same concerns about traditional credit cards that motivated the Credit CARD Act – improvident lending without regard to ability to pay on terms that make it difficult for consumers to understand the cost of the product or to repay it – apply to bank payday loans. Accordingly, the Credit CARD Act ability to pay and other requirements should apply to them, with appropriate modifications.

### *5. Excluding Lines of Credit Accessed by Account Numbers Could Lead to Ambiguities and Evasions*

Any time a product is exempted from a regulation, it provides a green light for creative evasions. In this instance, there are already reasons to fear new products that will operate like credit cards but be structured to evade appropriate protections.

The Board is proposing a distinction between use of an account number to purchase goods or services in a single step process (the number is directly used to purchase the good or service) and one used in a two-step process (the account number is used first to put money into a deposit account that is then used through a different card or account number to purchase the good or service). A single phone call could make the difference between an account that is considered a credit card and one that is not. A debit card that is used to access a credit line would be considered a credit card. But if the issuer required the consumer to first call an (800) number to transfer money into the deposit account and then use the debit card, it would not. This gives issuers a roadmap to create a credit card product that escapes the protections of the Credit CARD Act by simply using the two step process of requiring a transfer to an alleged "deposit" account.

One can easily imagine a prepaid card that starts out with a modest deposit but then quickly converts to a product largely based on credit. Whether the credit line was accessed through an overdraft feature or through a two-step process of transferring

[16] *Id.*.

money before the purchase, the card would be primarily a credit card, with deposits made after the fact to pay it off. Indeed, one prominent industry consultant has proposed a new type of account that merges deposit and credit accounts "in favor of a hub account that normally carried a borrowed balance."[17]

Issuers already have an incentive to look for ways to expand their prepaid card offerings because the interchange fees on prepaid cards are exempt from the new limits on debit and credit cards enacted in the Dodd-Frank Act. Giving the credit that is offered through these cards a pass on compliance with the Credit CARD Act will provide an additional incentive to find ways of continuing the old credit card abuses in a new form.

Finally, as noted above, prepaid credit products have already been used to evade state payday loan laws through preemption, and that trend may spread if the cards can also evade the *federal* protections of TILA's credit card provisions.

### B. Issuers Should Be Required to Consider the Ability to Pay of Only Those Consumers Liable on an Account

The Board has proposed amending Reg. Z § 226.51(a) to require that a card issuer consider the consumer's *independent* ability to pay. In particular, proposed Comment 51(a)(1)-4.iii would clarify that, as a general matter, an issuer cannot rely solely on *household* income to consider ability-to-repay. Proposed Comment 51(a)(1)-4.i would clarify that a card issuer can consider the income or assets of the consumer's spouse only to the extent that the consumer has an ownership interest in that income.

We support the proposed amendment to Reg. Z § 226.51(a) and accompanying changes to the Commentary. We have consistently taken the position that the ability-to-pay standard must be as meaningful and vigorous as possible. Thus, the issuer should be required to consider the ability to pay based solely on the income and assets of the consumer or consumers who are liable on the account. Considering the income of a non-obligated household member is contrary to the intent of the Credit CARD Act, given that improvident granting of credit was the very issue that the ability-to-pay provision was enacted to address.

Furthermore, we reiterate our request that the issuer be required to obtain some verification of the consumer's income.

We understand that some issuers have raised concerns that the proposed requirement to consider the consumer's independent ability to pay discriminates against women who are stay-at-home mothers. We do not share these concerns. First, to the extent that stay-at-home mother has a legal entitlement to a spouse's income, such as in a community property state or with a joint bank account, Comment 51(a)(1)-4.i provides that such income may be considered. However, if a stay-at-home mother incurs debt that

[17] Andrew Kahr, "*Why Keep Deposit and Credit Accounts Separate?,*" American Banker (Sept. 28, 2010).

she has no ability to repay, and she cannot access the spouse's income or assets to repay the debt, she will be in far worse position that if she had never incurred the debt.

Furthermore, consideration of spousal income can actually harm consumers. It creates the negative incentive that, if the consumer defaults, the issuer will be encouraged to wrongfully pursue the non-liable spouse for repayment because the granting of credit was based on the spouse's income. This is already a problem that attorneys often report to us: issuers aggressively seeking payment from non-liable spouses.

The proposed amendment is entirely consistent with the Equal Credit Opportunity Act. As the Board knows, Regulation B prohibits issuers from even asking about marital status if an applicant is seeking individual unsecured credit. Reg. B, § 202.5(d)(1). However, if the applicant relies upon property held jointly with a spouse, the issuer may not only seek information about the spouse, but require the spouse to sign an instrument necessary to reach the property. Reg. B, § 202.7(d)(2). In other words, if the applicant is applying individually, only her property and information are considered, but if she relies on jointly owned property (including income), then the issuer can require the spouse to have some liability for the account. This is entirely logical in that it permits the issuer to reach the spouse's property to repay the debt, and thus the applicant is not the only person left "holding the bag" for the debt.

Furthermore, the proposed amendment does not single out stay-at-home mothers but applies to many other individuals who have limited individual income but could report higher household incomes. Such examples include adult children living with parents, unemployed siblings living with employed siblings, and stay-at-home fathers.

Finally, we understand that issuers have raised these concerns about discrimination most particularly with respect to retail cards that are approved at point-of-sale, *i.e.*, "instant credit." This is because, for general purpose cards that are not instant credit, the issuer can follow up or make a counteroffer to a stay-at-home parent or other applicant unable to qualify on his or her own income. But for instant credit, such follow up may not be possible at the point of sale, and the applicant might not want the card badly enough to follow through with his or her other options to qualify. Thus, the proposed amendment might slow down the instant credit approval process, which relies heavily on the "impulse buy" nature of the transaction.

However, changing the proposed amendment in order make instant credit cards easier to approve is exactly the wrong thing to do. It is contrary to and undermines the ability-to-repay requirement, whereas the currently proposed amendment furthers and strengthens the requirement.

### C. <u>The Limitation on Fees to 25% of the Credit Limit Should Apply to Fees Charged Before the Account is Opened</u>

The Board has proposed amending Reg. Z § 226.52(a)(1) to apply the 25% limitation on fees for a credit card account to fees that the consumer is required to pay *before* account opening. We strongly support this proposal. This provision would address abuses by subprime card issuers attempting to evade the Credit CARD Act's 25% limit.

As the Board knows, certain subprime card issuers have been imposing steep fees that the issuers claim are imposed before the account is opened. First Premier, a notorious issuer of fee-harvester cards, offered one card that charged the maximum fees allowable - $75 for an initial credit limit of $300 (or $225 available credit) - but then charged up to $95 before the card was issued. This resulted in a grand total of $170 in fees for $225 of available credit. Clearly, such a card is aimed merely at harvesting fees and not providing credit. The proposed amendment to Reg. Z § 226.52(a)(1) would end such outrageous evasions of the Credit CARD Act's 25% limit.

Furthermore, the Board has proposed amending Reg. Z § 226.52(a)(1) to provide that the first year of a credit card account begins when consumer can use the account for transactions, even though the issuer can charge fees before then. We also support this proposal.

The Board has also proposed amending Reg. Z § 226.52(a)(1) to remove the phrase "charged to the account" to make clear that the 25% limit is absolute and does not just cover fees charged to the account. We also strongly support this proposal.

However, we note that existing Comment 52(a)(1) already clearly provided that the 25% limit applies to fees that the issuer requires the consumer to pay with respect to the account through other means. The Board should make clear in Supplementary Information to the final rule that, prior to the amendment, the 25% limit applied to fees required by the issuer but not charged to the account, and there was no change in this requirement.

Finally we strongly support the Board's proposal to amend Comment 52(a)(2)-1 to make clear that minimum interest charges and fixed finance charges are included as "fees." Permitting these charges to escape coverage from the Credit CARD Act's 25% limit would provide a gaping loophole that subprime issuers could exploit to evade the limit.

### D. Issuers Must be Prohibited from Circumventing the Protections Against Retroactive Rate Increases by Using Rebates or Waivers

The Board has proposed adding new Reg. Z § 226.55(e), which would provide that if an issuer promotes waiver or rebate of interest, fees, or other charges subject to Reg. Z § 226.55, any cessation of the waiver or rebate constitutes an increase for 226.55 purposes. We strongly support this proposal.

This proposal appears to address abuses that we have previously brought to the Board's attention. In our comments to the Board's October 2009 notice of proposed rulemaking, we noted the example of one issuer, Citibank, which purported to charge

29% APR, but promised to rebate 10% of the interest charges the next month if the customer paid on time. In effect, this allowed a retroactive rate hike if the consumer paid even one day late, circumventing Congress's clear intention that retroactive rate increases be imposed only if the consumer is 60 days late. The only difference is that the true, current interest rate is achieved over the course of two billing cycles rather than one, by a rate increase that is rebated. Proposed Reg. Z § 226.55(e) would prevent this sort of evasion and abuse, and we support it for that reason.

We do have one suggestion regarding the language of the proposal. Instead of providing that any "cessation" of a waiver or rebate constitutes an increase, the proposed rule should state that any "failure to provide" the waiver or rebate constitutes a rate increase. Cessation may imply that only a total and permanent termination of the waiver or rebate constitutes an increase. However, even a temporary failure to provide a rebate or waiver can constitute an increase. For example, in the above example, if the consumer is late by one day for only one month, the issuer might only fail to provide the rebate or waiver for that month. Yet that is a retroactive increase in the interest rate for that one month, on the basis of a 1-day late payment.

We also support new Comment 55(e)-2, which provides that a card issuer is considered to have "promoted" a waiver or rebate if it discloses the waiver or rebate:

- in an "advertisement" as defined in Reg. Z § 226.2(a)(2), or
- in a communication regarding an existing account, unless the disclosure is either provided in relation to an inquiry or dispute after a specific charge or occurs after issuer has waived or rebated interest or fees.

For purposes of new Reg. Z § 226.55(e), the definition of promotion should be as broad as possible. In fact, we urge the Board to treat any disclosure of a future rebate or waiver as a promotion unless the disclosure occurs in response to consumer inquiry or dispute, whether or not the consumer is an existing accountholder or not.

Finally, there is one part of the proposal on rebates and waivers that we do have serious concerns about. Proposed Comment 55(e)-2.ii.F states that an issuer does not promote a waiver or rebate when it promotes credit card rewards such as "cash back" on purchases or finance charges. We oppose this provision because it could provide a loophole or back-door method for issuers to evade the protections of proposed Reg. Z § 226.55(e). A rebate of interest promoted as a "reward program" differs very little from the rebate of interest in the above example from Citibank. Furthermore, as the Board knows, one of the highly promoted aspects of credit cards are such rewards programs, such as cash back, airline mileage, or points redeemable for merchandise. At least half of the top eight issuers invoke some form of penalty on rewards programs for paying late, and the trend is for this to become more common. Accordingly, rewards – especially but not solely cash back rewards – should be subject to the same rule as other interest rate rebates.

**E. <u>Grace Period Disclosures</u>**

The Board has proposed a number of changes to the grace period disclosure rules. For Comments 5a(b)(5)-1 and 6(b)(2)(v)-1,-3, the Board has proposed prohibiting issuers from disclosing the limitations imposed by the double cycle billing prohibition, and instead allowing such disclosure to be optional. In addition, the proposed changes would prohibit disclosure of the impact of payment allocation on the grace period. Finally, the Board's proposed changes would require use of model language for certain types of grace periods.

We support most of these changes, with the exception of the discussion in proposed Comment 6(b)(2)(v)-3 permitting one type of grace period that, as discussed below, should be banned as unfair and deceptive. However, we urge the Board to go further in standardizing the grace period disclosures and preventing deception by some issuers.

First, we ask the Board to develop model language for different types of grace periods and to require the use of such model language for all issuers. Second, we ask the Board to use its authority under the Federal Trade Commission Act to limit issuers to the types of grace periods for which there is model language. Such changes are necessary because some issuers are making grace period disclosures, and structuring the grace period themselves, in a manner that is confusing, deceptive, or unfair.

For example, Applied Card Bank offers a credit card for which it discloses: "No Interest is accrued on Purchases. No grace period is provided." [See Attachment 1] This disclosure is extremely confusing – is there a grace period or not? Will the consumer be charged interest or not? Part of the problem with the Applied Bank Card is that it purportedly charges "0%" APR, but in reality it substitutes steep fees for interest - $10 per month in maintenance fees, or $120 per year for a credit limit of $500, which is the equivalent of a closed-end loan of over 30% APR if the full credit limit is used. This card demonstrates, once again, the kind of abuses that have sprung up because of the elimination of the effective APR. The grace period abuse is related because the issuer is obfuscating the absence of a grace period by stating "No Interest on Purchases." The Applied disclosure is misleading because the consumer will incur charges even if the entire balance is paid in full every month.

One of the grace periods discussed in proposed Comment 6(b)(2)(v)-3 – a grace period that vanishes if the consumer takes out a cash advance – also is confusing and unfair and should be banned rather than enabled through the illustration in the proposed comment. Most consumers will not understand this complex and confusing grace period structure in which they have a grace period most of the time, but if they take out a cash advance, that grace period disappears for both the cash advance AND for purchases. Any issuer contemplating such a structure is clearly counting on consumers falling into the trap of losing their purchase grace period unexpectedly. Like other abuses such as payment allocation, such a structure is inherently overly complicated and difficult for consumers to understand.

Accordingly, the Board should eliminate Comment 6(b)(2)(v)-3, which appears to bless such an unfair and deceptive grace period structure, and instead warn issuers that such structures violate the FTC Act.

**III. Section-by-Section Comments**

**A. <u>Comment 5(b)(2)(iii)-1</u>**

We oppose the deletion of Comment 5(b)(2)(iii)-1, which provides that the exceptions in Reg. Z § 226.5(b)(2)(iii) do not extend to the failure to provide a periodic statement because of computer malfunction. A computer malfunction is not an acceptable excuse for failure to send a periodic statement if the issuer has failed to maintain adequate computer systems. While we understand that this Comment refers to a subsection that no longer exists, we urge the Board to instead create a new Comment 5(b)(2)(ii)-7 stating that failure to maintain adequate computer systems to prevent malfunction is not a reasonable procedure designed to endure that periodic statements are timely mailed or delivered.

**B. <u>Employee Preferential Rate Disclosures</u>**

The Board has proposed adding new Reg. Z §§ 226.5(b)(1)(iv)(C) and 226.6(b)(2)(i)(D), which require certain disclosures for employee preferential rates. As the Board rightfully notes, termination of an employee preferential rate is not a promotional rate, but is in fact a contingent rate increase.

Thus, Comment 55(b)(1)-4 should prohibit the new, post-termination increased rate from applying to the existing balance on the account (as well as from being increased during the first year of the account). In the Supplementary Information at footnote 1 (75 Fed. Reg. at 67460-61), the Board notes that 45 days notice is required prior to the imposition of the higher rate and that the limitations in Reg. Z § 226.55 apply. In order to make this limitation clear, we urge the Board to include the text of this footnote into a Comment. Otherwise, a court may misinterpret new Reg. Z §§ 226.5(b)(1)(iv)(C) and 226.6(b)(2)(i)(D) as permitting the increased, post-termination rate to apply to an existing balance and/or to not require 45 days notice.

**C. <u>Comment 5a(b)(6)-1</u>**

The Board has proposed amending Comment 5a(b)(6) by deleting a reference to Commentary for 226.5a(g) because such a Comment does not exist. Instead, we suggest that it be replaced with a cross-reference to Reg Z § 226.5a(g).

**D. <u>Minimum Payment Repayment Disclosures</u>**

The Board has proposed amending Reg. Z § 226.7(b)(12)(i) and (ii) to permit issuers to disclose repayment figures that are rounded to *either the* nearest whole dollar or nearest cent. In addition, proposed Comment 7(b)(12)-1 provides that the issuer must be consistent in its use of a rounding method.

We have no problem with the proposed change. However, we again raise the issue that the disclosure of the amount of time required for repayment if only minimum payments are made should be disclosed in years plus months (e.g., 7 years, 6 months). At a minimum, issuers should be given the option of rounding to the nearest year or the nearest year plus months, just like they are being given an option to round to either the nearest whole dollar or nearest cent.

**E. Deferred Interest Warning for Periodic Statements**

The Board has proposed amending Reg. Z § 226.7(b)(14) to permit the deferred interest warning to be on any page of the periodic statement, so long as on the front of the page. As we have repeatedly stated, we believe that deferred interest plans should be prohibited, and that TILA § 1637(j)(1) prohibits them. These plans are incredible confusing and abusive, presenting a trap for consumers. We continue to see complaints about them.

Indeed, the New York Times reports these plans are being marketed to patients in the form of "no interest" medical credit cards.[18] If there is any practice that is prone to abuse, it is the practice of health care providers – trusted authority figures - pitching high-cost, trap-laden "no interest" credit cards to unsuspecting and often vulnerable patients who do not have insurance coverage for a particular medical procedure.

Furthermore, we oppose the proposed amendment. The deferred interest warning should be on the front of the first page of the periodic statement, so that consumers see it first and see it immediately. In the alternative, the warning should be grouped with the disclosure of the deferred interest balance, deferred interest APR, and accrued interest for the deferred interest balance.

**F. Change-In-Term Notices**

The Board has proposed a number of changes to the change-in-term notice provisions. We have comments on some of these proposals. In addition, we note that there is a technical scrivener's error in Reg. Z § 226.9(c)(2)(i), which is the first item in our list.

- In its February 22, 2010 final rule, the Board created new Reg. Z § 226.9(c)(2)(i)(B), which amended the exception to change-in-terms notice requirement for changes agreed to by the consumer. This new subsection limited the exception to changes relatively unique to the consumer or for substitution of collateral. The new subsection had been proposed as Comment 9(c)(2)(i)–3, but the Board moved it to Reg. Z § 226.9(c)(2)(i)(B) in the February 2010 final rule.

[18] Walecia Konrad, *Think Twice Before Signing Up for That Medical Credit Card*, New York Times, Nov. 26, 2010. The G.E. Money Bank CareCredit Card is a deferred interest plan. See Attachment 3.

75 Fed. Reg. at 7693. *However, a scrivener's error occurred because the Board failed to remove the older, existing exception for changes agreed to by the consumer in Reg. Z § 226.9(c)(2)(i)(A), which is in the second sentence.*

Thus, as currently written, Reg. Z § 226.9(c)(2)(i) contains two exceptions for changes agreed to by the consumer – one in paragraph (A) and one in paragraph (B). Furthermore, this older exception in paragraph (A) does NOT contain the limitations in the new paragraph (B), and could be interpreted as providing a broader exception or loophole to the change-in-terms notice. Moreover, the paragraph (A) exception is no longer interpreted by a Commentary provision to limit its scope, because the Comment was moved to paragraph (B). *Thus, we urge the Board to remove the older exception in paragraph (A).*

- The Board has proposed revising Comment 9(c)(2)(iv)-3 and -4 and Comment 9(c)(2)(v)-3 and -4 to exclude from the change-in-terms notice requirement the situation when an issuer switches from a variable rate to a lower non-variable, or vice versa, in connection with a promotional or workout program, if disclosures for those programs are properly made, or if the lower rate is required pursuant to the Servicemembers Civil Relief Act. We have no objection to these changes. However, the Board should have a cross-reference in Comment (c)(2)(iv)-4 to Comment 55(b)(2)-4, which provides that an issuer cannot change from a fixed rate to a variable rate for CARD Act credit cards, unless one of the exceptions in section 226.55 applies.

- The Board has proposed adding new Comment 9(c)(2)(v)-10 to provide that including the information required by Reg. Z § 226.9(c)(2)(v)(B)(1) in the account-opening table complies with 226.9(c)(2)(v)(B)(2) if it is the first listing of the introductory rate. While the proposed Comment is not objectionable, we suggest that the Board also require compliance with Reg. Z § 226.16(g) as part of compliance with Reg. Z § 226.9(c)(2)(v)(B), especially when the first listing of the introductory rate is *not* in the account-opening table.

- The Board has proposed Comment 9(c)(2)(v)-5, which removes the right to reject from telephone disclosure of promotional rates if the post-promotional rate is not higher than the pre-promotional rate. We object to this proposal. Even if the post-promotional rate is no higher than the pre-promotional rate, a consumer might want to reject the promotional program because he or she bought goods not understanding based on the telephone disclosure that the promotional rate was only temporary. At a minimum, the Board should provide the consumer the right to return any goods without charge when the consumer bought those goods based upon telephone disclosure of the promotional rate program.

## G. Reg. Z § 226.10(b)(4) and Comment 10(b)-2

The Board has proposed amending Reg. Z § 226.10(b)(4) and adding new Comment 10(b)-2, which provides that if a creditor promotes a specific method of payment, any payment made via that method is a conforming payment if it is made prior to the payment cut-off time. We support these proposed changes. We urge the Board to define "promote" broadly for these purposes, as "making any statement offering a particular payment method as an option."

We also urge the Board to re-word the changes to Reg. Z § 226.10(b)(4) to clearly specify that payments made via a promoted method are conforming as such (*additions in italics)*:

> (4) Nonconforming payments. If a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments as permitted under this § 226.10, but accepts a payment that does not conform to the requirements ~~<via a payment method that the creditor does not otherwise promote>~~ the creditor shall credit the payment within five days of receipt. *A payment via a payment method that the creditor promotes cannot be considered nonconforming on the basis that the payment was made via that payment method.*

**H. <u>Comment 13(c)-2</u>**

The Board has proposed adding in Comment 13(c)-2 a new exception to the rule that issuers cannot reverse a credit given for an alleged billing error. The exception permits the issuer to reverse a credit when a merchant and issuer both give the consumer a credit for the same billing error, *i.e.*, the consumer has been given a double credit. We have no objection to this proposal, but believe it should be the ONLY exception to the rule against reversal of credits given for an alleged billing error.

**I. <u>Penalty Fee Restrictions</u>**

**1. *Multiple fees for returned payment***

The Board has made proposed changes that implicate the issue of whether an issuer can charge two returned payment fees in the same billing cycle. We are concerned that the Board has not made it explicitly clear that an issuer can only impose two returned payment fees if there are two separate payments made, both of which are returned.

The Board has proposed revising Reg. Z § 226.52(b)(1)(ii)(B) to clarify that an issuer may impose a penalty fee of $35 if there is a second violation within *same billing cycle* or next 6 billing cycles. We note that the "same billing cycle" provision can only apply to returned payment fees for a second payment submitted in the same billing cycle, and we urge that revised Reg. Z § 226.52(b)(1)(ii)(B) clearly state so.

As the Board notes, two penalty fees for the same type of violation should be a very infrequent occurrence. There are several other provisions of Reg. Z and the Commentary that prohibit them for specific types of penalty fees. Reg. Z § 226.56(j)(1) limits over-the-limit fees to one per billing cycle. Under Reg. Z § 226.52(b)(2)(ii), only one late fee should be permitted during a billing cycle because only one payment is due. Comment 52(b)(2)(i)-2 provides that if a payment that was returned is resubmitted a subsequent time, no additional fee may be charged. Thus, the only time two penalty fees of the same type could be charged in one billing cycle is the rare instance when the consumer makes two payment within the billing cycle that are returned by the consumer's bank.

We recognize that these other provisions should result in an interpretation that the "same billing cycle" aspect of Reg. Z § 226.52(b)(1)(ii)(B) is limited to returned payment fees for a second returned payment. Unfortunately, courts have been known to interpret provisions of regulations that they believe conflicting a way that eliminates the restrictions of the more protective provision. Thus, Reg. Z § 226.52(b)(1)(ii)(B) should explicitly limit the "same billing cycle" language to a second returned payment. In the alternative, the Reg. Z provision or an accompanying Comment should cross-reference the restrictions on multiple fees in the same billing cycle imposed by Reg. Z §§ 226.56(j)(1), 226.52(b)(2)(ii), and Comment 52(b)(2)(i)-2.

Better yet, we question whether two penalty fees should even be permitted in this rare situation. As the Board points out, in most situations only one fee is permitted per billing cycle for the same type of violation. The first $25 returned payment fee is more than enough to penalize the consumer and to compensate the issuer for the costs of returning two payments. One even can imagine an issuer that would encourage the consumer to take the chance at submitting second, chancy payment, hoping to be able to recoup a second fee. It would simplify the rules and avoid unfairness to have a simple rule permitting only one late or returned payment fee per month.

### 2. *Over-the-limit fees*

The Board has proposed amending Comment 52(b)(2)(ii)-1 to include a new example of where a returned payment causes the consumer to go over the credit limit for an account. The example states that the issuer may charge an over-the-limit fee or a returned payment fee, but not both. We support this new example.

However, we do not support the Board's proposal to add a provision in Comment 52(b)(1)(ii)-1.ii stating that an issuer may impose three over-the-limit fees per transgression despite the one fee per transgression limit of Reg. Z § 226.52(b)(1)(ii). In TILA Section 1665d, Congress gave the Board expansive authority to set limits on penalty fees. The Board is well within its authority to limit over-the-limit fees to one per transgression. After all, Board has contradicted explicit language of the Credit CARD Act at times, such as Reg. Z § 226.9(c)(2)(iv)(B)'s elimination of the right to reject an increase in the annual percentage rate for an account. The Board should do the same in this instance.

### 3. *Inactivity fees*

The Board has proposed to amend Comment 52(b)(2)(i)-5 to permit issuers to consider account activity when granting a waiver of an annual fee, if the issuer does not promote the waiver for purposes of Reg. Z § 226.55(e). If the definition of "promotion" is not narrowed, as we discuss in our comments in Section I.E., then this exception should be more narrowly written. It should be limited to only fee waivers pursuant to the consumer's request or only in a unique situation with appropriate indicia of uniqueness.

### J. Payment Allocation

The Board has proposed adding Reg. Z § 226.53(b)(2) and Comment 53(b)-3 to create an exception to allow consumers to choose the allocation when there is a secured balance and an unsecured balance on a credit card. The Board cites as an example a credit card used to purchase a motorcycle as well as accessories (e,g., helmets), the first of which is secured by the motorcycle. While the exception itself appears innocuous, it unfortunately furthers and abets the problem of spurious open-end credit. The credit card account established to buy a motorcycle really should be treated as a closed-end account. Decades after the *Benion v. Bank One*[19] case, practitioners continue to report that credit cards used to purchase big ticket items – including credit cards used to purchase motorcycles – are rife with deceptions and abuses. An example of such abuses, in which a spurious "open-end" account was set up for an $11,000 motorcycle, is attached as Attachment 2.

### K. Promotional Fee Programs

The Board has proposed a new exception for promotional fee programs from the protections in Reg. Z § 226.55, which limits increases in APRs, fees and charges. The Board has also proposed changes to Comment 5a(b)(2)-4, Reg. Z § 266.9(c)(2)(v)(B), and Reg. Z § 226.16(g) to implement this exception. While we are not opposed to the idea of promotional fee programs, we do have concerns regarding the current proposal.

It is important that consumers receive advance notice when the period for a promotional fee expires and the fee will be imposed. This is particularly necessary for promotional programs for annual fees, *i.e.*, "no annual fee for the first year" promotions. Because of the intervening year, consumers may forget that an annual fee will be imposed after the first year, or exactly when the first year ends. Unlike the APR, there is no mention of the annual fee on the periodic statement, and thus no monthly reminder that the current lack of fees is promotional and due to expire.

Current section 226.9(e)(1) requires that if a card issuer imposes any annual or other periodic fee for renewal, the issuer must provide notice of "at least 30 days or one billing cycle, whichever is less, before the mailing or the delivery of the periodic statement on which any renewal fee is initially charged to the account." However, this provision provides the consumer with little notice, and there also may be fees that were previously waived that can be charged without such notice.

[19] 967 F. Supp. 1031 (N.D. Ill. 1997), *aff'd*, 144 F.3d 1056 (7th Cir. 1998).

Thus we urge that the Board require a notice in the periodic statement for the billing cycle prior to the expiration of the promotional period for any post-promotional fee will be imposed, or is subject to being imposed, in the next billing cycle.

### L. Servicemembers Civil Relief Act Exception

The Board has proposed adding new Comment 55(b)(6)-2, which provides that the Servicemembers Civil Relief Act (SCRA) exception in Reg. Z § 226.55(b)(6) also applies to reductions to amounts consistent with SCRA, *i.e.*, voluntary reductions. We believe this proposed Comment must be revised to avoid creating a loophole to the protections of Reg. Z § 226.55.

The proposed exception should only apply if the issuer voluntarily reduces the APR on the basis of the consumer's service in the military. Otherwise, we are concerned that this change could provide a potential avenue for abuse. Without a limitation to voluntary reductions on the basis of military service, an issuer could reduce an APR to 6%, promote it to the consumer with the purpose of inducing the consumer to rely upon it for making purchases or transferring a balance, then use Comment 55(b)(6)-2 to later increase the rate and apply to an existing balance.

### M. Re-evaluation of rate increases

The Board has proposed adding new Comment 59(a)(1)-3, which deals with requirements for rate re-evaluations after an issuer changes a rate from a fixed to a variable rate, and vice versa. The proposed Comment would provide that such a change is not an increase when, at the time of the change, the result is an equal or lower rate. The increase occurs when the variable rate goes up and is higher than the former fixed rate, or when the former variable rate goes down and is lower than the new fixed rate.

We are opposed to this change with respect to a change from a fixed to variable rates. For such a change, the issuer must assess the factors *at the time of the change* for purposes of re-evaluation. In other words, consider a consumer whose rate is changed from a fixed rate of 15% to a rate of prime plus 10%. Even though the resulting rate may be lower, the important consideration for purposes of re-evaluation is – "why was this consumer given a margin of 10%?" Yet under Reg. Z § 226.59(d), the criteria that resulted in the consumer being priced at a margin of 10% will never be considered because the rate increase will be pegged to the time that the prime rate rises, not the time that the change occurred. The Board should revise Comment 59(a)(1)-3 to require that, in such circumstances, the issuer must consider the criteria that resulted in the particular margin being applied to the consumer's account.

### N. Card agreements on website

Though this was not an aspect of the proposed rules, we offer some suggestions on improving the transparency of credit card information and the usefulness of the card agreements on the Board's website. The agreements should clearly state the name of the cards to which it applies, including any co-branding. If one agreement applies to seven cards, each card should be listed on the top of the agreement to allow for comparison & basic understanding of the terms. Additionally, it would be useful to have a simple declarative statement that the issuers have represented that the terms and conditions are current and up to date.

**IV. Other Changes We Support**

We support the following proposed changes for the reasons stated by the Board in the Supplementary Information:

- Reg. Z § 226.5(b)(2)(ii), which would re-establish the 14 day period to pay for open-end credit that is not a credit card.

- Reg. Z § 226.9(c)(2)(ii) which will add to the scope of a "significant change in account terms" those terms required to be disclosed by Reg. § 226.6(b)(4). However, once again, we reiterate our opposition to the exclusion set forth in Reg. Z § 226.9(c)(2)(iii) for new fees not disclosed in the account opening table, as we believe that the addition of fees, other than one-time fees for time-sensitive matters, should require a change-in-terms notice.

- Comment 9(c)(2)-1, which would be revised to state that changes set forth initially, and thus exempt from the change-in-terms notice requirement, must be consistent with applicable requirements, including that issuers must make promotional rates disclosure under § 226.9(c)(2)(v)(B).

- Reg. Z § 226.9(c)(2)(v)(C), which provides that the exception for variable rates applies to all open-end credit but requires that the index is not under the creditor's control. We hope this proposed provision will prevent variable rate "floors" for all types of open-end credit.

- Comment 10(e)-4, which provides that the prohibition on "pay-to-pay" in Reg. Z § 226.10(e) applies to third party service providers.

- Comment 51(a)(2)-2, which requires issuers, in estimating the minimum payment for purposes of the ability-to-repay analysis, to include fees that are post-promotional if there is a promotional fee program.

- Comment 52(b)(2)(ii)-1.i.B, which provides that if an issuer does not include a prior overdue late payment in the next month's minimum payment, the issuer cannot charge a late fee if the consumer pays the second minimum payment on time, but not the first minimum payment.

- Changes to Comment 55(a)-1, which clarify that the prohibition against rate increases applies even when a rate increase is disclosed in advance, unless an exception in 226.55(b) permits the increase.

- The new example in Comment 55(b)-1, which clarifies that if an issuer imposes a penalty rate on an existing balance because the consumer is over 60 days late in paying the minimum payment, and then the consumer pays on time for six months during a period in which a workout arrangement or SCRA reduction is in effect, the issuer cannot impose a rate higher than the pre-penalty rate using the workout or SCRA exceptions.

- Changes to Reg. Z § 226.55(b)(3)(iii), which make clear that an issuer cannot apply a new fee or increase a fee after the account is closed or after the consumer is not permitted to use the account for new transactions. We also support the change stating that an account is opened no earlier than when it can be first used for transactions.

- Changes to Comment 55(c)(1)-3, which clarify that the issuer is not permitted to increase fees that apply to the entire account during the first year, or when account is closed, or the consumer is not permitted to use the account for new transactions.

## V. Conclusion

We thank the Board for its efforts to prevent evasions of the Credit CARD Act, which improve the protections under current regulations. We hope that the Board will consider our suggestions for preventing further evasions. Please feel free to contact us if you have any questions concerning our comments.